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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No.

PHILIP JOSEPH MAITA, *Petitioner,*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI
to the Superior Court of the State of California, in and for the County of San Mateo

Petitioner Philip Joseph Maita prays that a writ of certiorari issue to review the judgment of the Superior Court of the State of California in and for the County of San Mateo.

OPINION BELOW

The Judgment and Order of the Superior Court (People v. Maita and Vennemeyer, No. 149826) is set forth in Appendix A.

The order of the Court of Appeal denying the Petition for Writ of Habeas Corpus/Certiorari is set forth in Appendix B.

The order of the California Supreme Court denying Petition for Hearing of Habeas Corpus/Certiorari is set forth in Appendix C.

JURISDICTION

The order of the California Supreme Court denying petitioner's Petition for Hearing was entered June 15, 1972.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

ONE

Did the Superior Court deny petitioner his right to trial by jury in violation of the Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment?

TWO

Do California Penal Code Sections 11225, 11226, 11227, 11228 and 11229, as interpreted by the California courts, and as applied to petitioner, constitute a statutory scheme for the prior restraint of material presumptively protected by the First Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First, Sixth and Fourteenth Amendments to the Constitution of the United States, as follows:

First Amendment: "Congress shall make no law . . . abridging the freedom of speech. . ."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ."

Fourteenth Amendment: "Nor shall any state deprive any person of life, liberty or property without due process of law. . ."

California Penal Code Sections 11225 et seq., as follows:

§ 11225. Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation or prostitution, are held or occur, is a nuisance which shall be enjoined, abated and prevented, whether it is a public or private nuisance.

Nothing in this section shall be construed to apply the definition of a nuisance to a private residence where illegal gambling is conducted on an intermittent basis and without the purpose of producing profit for the owner or occupier of the premises.

§ 11226. Whenever there is reason to believe that a nuisance as defined in this article is kept, maintained or is in existence in any county, the

district attorney, in the name of the people of the State of California, must, or any citizen of the State resident within said county, in his own name may, maintain an action in equity to abate and prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee or agent of the building, or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting it.

§ 11227. Whenever the existence of a nuisance is shown in an action brought under this article to the satisfaction of the court or judge thereof, either by verified complaint or affidavit, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance.

§ 11228. Actions brought under this article have precedence over all actions, excepting criminal proceedings, election contests and hearings on injunctions, and in such actions evidence of the general reputation of a place is admissible for the purpose of proving the existence of a nuisance. If the complaint is filed by a citizen, it shall not be dismissed by the plaintiff or for want of prosecution except upon a sworn statement made by the complainant and his attorney, setting forth the reasons why the action should be dismissed, and the dismissal ordered by the court. In case of failure to prosecute any such action with reasonable diligence, may substitute any other citizen consenting thereto for the plaintiff. If the action is brought by a citizen and the court finds there was no reasonable ground or cause therefor, the costs shall be taxed against such citizen.

§ 11229. Any violation or disobedience of an injunction or order expressly provided for by this article is punishable as a contempt of court by a fine of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000), by imprisonment in the county jail for not less than one nor more than six months, or by both.

STATEMENTS OF FACTS

Petitioner Philip Joseph Maita has for the past eight years owned a bar in San Mateo, California. In addition to alcoholic beverages, the "Easy Street," as the premises are called, offers entertainment to its patrons.

On December 11, 1969, the District Attorney of San Mateo County filed a civil complaint against petitioner and the owner of the building in which the Easy Street is located. The complaint alleged, pursuant to Section 11225 of the California Penal Code, that the entertainment presented on the premises constituted a public nuisance. The complaint prayed for injunctive relief to abate the nuisance.

Pursuant to California Penal Code Section 11227, the San Mateo County Superior Court on January 27, 1970, issued its temporary injunction enjoining petitioner from presenting certain types of films and other entertainment to adult patrons on his premises. Petitioner sought relief from this injunction through the California courts without success.

On September 14, 1971, the temporary injunction was modified pursuant to stipulation between petitioner and the San Mateo County District Attorney. The injunction as modified continued to enjoin certain types of films and other entertainment.

On February 2, 1972, petitioner was served with an order to show cause charging him with four counts of contempt of court for violating the preliminary injunction of January 27, 1970, as modified September 14, 1971. The order to show cause charged that on each of four dates in January of 1972, petitioner exhibited sexually explicit films and permitted nude cocktail waitresses on his premises, all in violation of the injunction.

Each of the four counts of contempt of court with which petitioner was charged carried a maximum penalty of six months in the county jail and/or a $1,000 fine.

Petitioner appeared in San Mateo County Superior Court on February 17, 1972. He requested a trial by jury; this request was denied. Petitioner also moved to quash the order to show cause, upon the ground that the temporary injunction of January 27, 1970, as modified September 14, 1971, was a prior restraint on matter presumptively protected by the First Amendment. This motion was denied.

Thereafter the Superior Court took testimony from the People and from petitioner. The District Attorney offered no proof that the films which constituted one of the bases of the contempt citation were obscene.

On March 3, 1972, the Superior Court held petitioner in contempt of court on each of the four counts charged. Petitioner was sentenced to six months in the county jail on Count One, with four of the six months suspended. He was sentenced to sixty days in the county jail on each of the other three counts, with these sentences to be served concurrent to the sentence imposed on Count One. Petitioner was also ordered to pay a fine of $1,000 on Count One, and $500 on each of Counts Two, Three and Four, for a total of $2,500.

Since a judgment of contempt is not appealable under California law, petitioner sought relief on habeas corpus and certiorari from the Court of Appeal. This was denied on May 19, 1972. The California Supreme Court denied a hearing on June 15, 1972.

Thereafter on June 26, 1972, the Honorable William O. Douglas, Associate Justice of the United States Supreme Court, issued an order staying the judgment of the San Mateo County Superior Court pending the filing and adjudication of a petition for writ of certiorari in the United States Supreme Court (No. A-1324).

REASONS FOR GRANTING THE PETITION AS TO QUESTION ONE

DID THE SUPERIOR COURT DENY PETITIONER HIS RIGHT TO TRIAL BY JURY IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION MADE APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT?

ARGUMENT

The trial court denied petitioner's request for trial by jury upon the ground that petitioner was charged with a petty offense under *Cheff v. Schnackenburg,* 384 U.S. 373, 16 L.Ed.2d 629, 86 S.Ct. 1523 (1966) and therefore was not entitled to trial by jury. (See Appendix D).

In *Baldwin v. New York,* 399 U.S. 66, 69, 26 L.Ed. 2d 437, 90 S.Ct. 1886 (1970), this Court concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." Petitioner was charged with four separate counts of contempt, *each* of which carried a possible penalty of imprisonment for six months and a $1,000 fine.

Under California law, the Superior Court had the right in its discretion to order that sentences on each count be made to run consecutively. *California Penal Code* Section 669; *People v. Loeber* (1958), 158 Cal. App.2d 730, 323 P.2d 136, appeal dismissed 358 U.S. 139, 3 L.Ed.2d 226, 79 S.Ct. 242. Accordingly, at the time the Superior Court denied petitioner's request for a jury trial, the maximum authorized penalty for the charges against him was two years imprisonment and a $4,000 fine.

This Court has cited the maximum authorized penalty as the most relevant criterion for ascertaining whether an offense is petty for purposes of the right to trial by jury. *Frank v. United States,* 395 U.S. 147, 148, 23 L.Ed.2d 162, 165, 89 S.Ct. 1503 (1969). An authorized penalty of two years' imprisonment was held to require a jury trial in *Duncan v. Louisiana,* 391 U.S. 145, 159-160, 20 L.Ed.2d 491, 502, 88 S.Ct. 1444 (1968). It is worth noting that here, as in *Duncan v. Louisiana, supra,* the actual sentence imposed was sixty days in jail; here, however, petitioner was also ordered to pay a $2,500 fine.

The significance of the fine is that "the Fourteenth Amendment guarantees a right to trial by jury in all criminal cases that—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee," *Williams v. Florida,* 399 U.S. 78, 86, 26 L.Ed.2d 446, 452, 90 S.Ct. 1893 (1970). In the federal courts, an offense punishable with a fine of $1,000.00, as authorized by California Penal Code §11229, would not be considered a petty offense for purposes of the right to trial by jury, even leaving aside the fact that petitioner was charged with four offenses carrying a possible fine of $1,000.00. *U.S. v. R.L. Polk & Co.,* 438 F.2d 377 (6 Cir. 1971).

U.S. v. R.L. Polk & Co. was a recent federal case involving a contempt citation against a corporation with annual sales of approximately $50 million and net worth of approximately $20 million. Trial by jury was demanded by the defendant and denied by the

court. The District Court thereafter imposed a fine of $35,000.00. The Court of Appeals reduced the fine from $35,000.00 to $500.00, holding, upon authority of *Duncan v. Louisiana, supra,* "that a fine upon a corporation in excess of $500.00 no longer permits the underlying offense to be characterized as petty." *U.S. v. R.L. Polk & Co., supra,* 438 F.2d at 380. It is hardly necessary to suggest that if a fine in excess of $500.00 imposed upon a giant corporation is sufficiently serious to require a jury trial, a fine of $2500.00 imposed upon an individual defendant is at least equally serious.

This Court has not yet passed upon the applicability of *Baldwin v. New York, supra,* to cases wherein a defendant is charged with multiple counts, each of which is punishable by a maximum penalty of six months' imprisonment. Those State courts which have dealt with the problem have adopted the rule that where a jury trial is not granted upon multiple petty charges, the court in imposing sentence can impose no greater sentence than that which would be authorized for a single count. *State v. Koscot Interplanetary Inc.* (1972) 330 N.Y.S.2d 492; *State v. Owens* (1969) 54 N.J. 153, 254 A.2d 97. There is abundant authority for the proposition that the maximum penalties of multiple counts must be aggregated to determine whether or not a defendant is on trial for a petty or serious offense. *Chambers v. District of Columbia,* 90 U.S.App. D.C. 153, 194 F.2d 336 (D.C. Cir. 1952) (right to counsel); *James v. Headley,* 410 F.2d 325 (5 Cir. 1969).

To deny the right to trial by jury merely because a carefully drawn charge does not contain any one offense carrying more than six months' imprisonment would be to authorize prosecutors to seek extremely serious penalties against defendants without their being afforded fundamental Sixth Amendment protection. Petitioner was the victim of precisely such a process. It poses important questions of federal constitutional law, and warrants a hearing before this Court.

AS TO QUESTION TWO

DO CALIFORNIA PENAL CODE SECTIONS 11225, 11226, 11227, 11228 AND 11229, AS INTERPRETED BY THE CALIFORNIA COURTS, AND AS APPLIED TO PETITIONER, CONSTITUTE A STATUTORY SCHEME FOR THE PRIOR RESTRAINT OF MATERIAL PRESUMPTIVELY PROTECTED BY FIRST AMENDMENT?

ARGUMENT

In January of 1970 the People of the State of California obtained an injunction, pursuant to California Penal Code, which prohibited, *inter alia,* "motion pictures . . . simulating the exhibition of human genitalia," and sexual activity. As modified in September, 1971, the injunction continued to prohibit motion pictures simulating acts of sexual conduct. See Appendix D.

It is clear that the prohibitions contained in the injunction do not correspond to the constituent elements of obscenity. *Roth v. United States,* 354 U.S.

476, 489, 1 L.Ed.2d 1498, 1509, 77 S.Ct. 1304; *Memoirs v. Massachusetts,* 383 U.S. 413, 418, 16 L.Ed. 2d 1, 5, 86 S.Ct. 975 (1966). Since films which are not obscene are protected by the First Amendment, *Burstyn v. Wilson,* 343 U.S. 495, 502, 96 L.Ed. 1098, 1106, 72 S.Ct. 777 (1952), the effect of the injunction was to enjoin petitioner from showing films presumptively entitled to First Amendment protection. (It should be emphasized that the films which formed the basis for the contempt citation were not obscene; indeed, the trial court held that whether or not the films were obscene was immaterial. See Appendix D.)

By enjoining the dissemination of constitutionally protected matter in the future because of alleged violations in the past, California Penal Code Section 11225 et seq. constitute a prior restraint on free expression. *Near v. Minnesota,* 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931); *Freedman v. Maryland,* 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965). The California statutes, with their reliance upon "public nuisance" grounds, are remarkably similar to the Minnesota statutes held unconstitutional in *Near v. Minnesota, supra.*

Petitioner was convicted because he exhibited certain films. These films were not obscene, and no evidence tending to prove that they might be obscene was ever introduced. The California statutes authorizing this outrageous result should be held unconstitutional.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this petition for Writ of Certiorari be granted.

Dated, San Jose, California,
September 1, 1972.

DONALD A. TENENBAUM,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

In the Superior Court of the State of California
in and for the County of San Mateo

No. 149826

The People of the State of California,
Plaintiff,

vs.

Philip Joseph Maita, August Vennemeyer,
Defendants.

[March 16, 1972]

JUDGMENT OF CONTEMPT AND ORDER OF COMMITMENT

The People of the State of California to the Sheriff of the County of San Mateo, State of California, Greeting:

Whereas on January 27, 1970, a Temporary Injunction was duly and regularly granted and issued by the Honorable James T. O'Keefe, Judge of the above entitled Court, enjoining and restraining Philip Joseph Maita and August Vennemeyer, their agents and assignees, and each of them, from conducting, maintaining, using, occupying, permitting, causing or exhibiting acts of lewdness constituting a nui-

sance upon the premises of Easy Street, 2322 South El Camino Real, San Mateo, California, as more particularly described therein; and

Whereas, the said Temporary Injunction was, upon defendant of the parties as more particularly set forth in the Order Modifying Preliminary Injunction made and filed in the above action on September 14, 1971; and

Whereas, a true and correct copy of the Temporary Injunction was personally served upon Philip Joseph Maita by M. L. Greenfield, Inspector in the Office of the District Attorney, County of San Mateo, State of California, on January 29, 1970 and a true and correct copy of the Temporary Injunction was personally served upon August Vennemeyer by Inspector M. L. Greenfield on January 27, 1970; and

Whereas, on February 2, 1972, certified copies of Order to Show Cause Re Contempt issued by this Court on February 2, 1972, and Declaration of Charles G. De Mar in Support of Order to Show Cause Re Contempt, including Exhibit "A" Thereto, dated February 2, 1972, were personally served upon Philip Joseph Maita, Easy Street, 2322 South El Camino Real, San Mateo, California and personally served upon August Vennemeyer, 121 Entrada Court, San Francisco, California by Inspector M. L. Greenfield, commanding the said Philip Joseph Maita and August Vennemeyer, and each of them, to appear before the above entitled Court in Department 9 thereof on February 17, 1972, at the hour of 2 o'clock p.m. and then and there to show cause, if any

they may have, why they and each of them should not be adjudged guilty of contempt of court and punished accordingly for wilfully disobeying and violating the Temporary Injunction heretofore duly granted and issued on January 27, 1970, as modified by stipulated Order Modifying Preliminary Injunction, made and filed September 14, 1971, which Injunction and the violations thereof by said defendants, and each of them, are more particularly described in the Declaration of Charles G. De Mar in Support of Order to Show Cause Re Contempt filed herein; and

Whereas, at the time and place named in the said Order to Show Cause Re Contempt namely on February 17, 1972, and thereafter on February 18, 1972 and March 2, 1972 and March 3, 1972, in and before Department 9 and Department 1 of the Superior Court of the State of California, in and for the County of San Mateo, Plaintiff The People of the State of California and its counsel H. Kelly Ogle, Deputy District Attorney, San Mateo County, and defendant Philip Joseph Maita and his counsel Donald A. Tenenbaum, Esq., and defendant August Vennemeyer and his counsel James T. Davis, Esq., and each of them, did appear and proceedings were had on the disobedience and violations of said Injunction by defendants, and each of them, as alleged; and

Whereas, oral and documentary evidence having been introduced, all parties having rested and the matter submitted to the Court for decision, *The Court Finds:*

1) The Temporary Injunction dated January 27, 1970, as thereafter modified pursuant to stipulation of the parties set forth in the Order Modifying Preliminary Injunction dated September 14, 1971, was duly and regularly granted and made.

2) Defendant August Vennemeyer is one of the owners of the real property premises known as Easy Street, 2322 El Camino Real, San Mateo, California; is a proper party to these proceedings by reason of that fact, but has not knowingly or wilfully acted in disobedience or violation of said Injunction and is not in contempt thereof and as to defendant August Vennemeyer only the Order to Show Cause re Contempt is discharged.

3) Defendant Philip Joseph Maita has at all times since the granting of the Injunction, and the stipulated modification thereof, had and now has personal notice and actual knowledge of each, every and all of the terms thereof.

4) Defendant Philip Joseph Maita has at all times since the granting of the Injunction, and the stipulated modification thereof, had and now has the ability to comply therewith and confinement in the County Jail will in no way interfere with his ability to comply with the Injunction as modified.

5) On January 21, 1972, January 22, 1972, January 23, 1972 and January 24, 1972, and each of said dates, defendant Philip Joseph Maita at, in and about his place of business called Easy Street, 2322 South El Camino Real, City of San Mateo, County of San Mateo, State of California, deliberately, wilfully and

contemptuously disobeyed, violated and failed to comply with the Injunction and the stipulated modification thereof in the following particulars:

(a) *January 21, 1972:* Violated Paragraph 1 of the original Temporary Injunction by permitting, causing and exhibiting cocktail waitresses, the genitalia and anuses and pubic hair areas of which were not covered completely by material which could not be seen through by the nearest spectator. Violated subparagraph 2 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of sexual intercourse by, with and between human beings. Violated subparagraph 5 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating the exhibition of acts of rectal foreplay, kissing, touching, caressing, fondling or manipulation of male or female genitalia. Violated subparagraph 8 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating sexual activity where the genitals of the performers can then be seen. Violated subparagraph 9 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating the exhibition of male and female humans engaging in activities prohibited by subparagraphs 2, 4, 5, 6 and 8 of paragraph 2 of the modified Injunction by the use of drawings or inanimate objects, referring specifically to the motion picture entitled "Snow White and the Seven Dwarfs."

(b) *January 22, 1972:* Violated Paragraph 1 of the original Temporary Injunction by permitting, causing and exhibiting cocktail waitresses, the genitalia and anuses and pubic hair areas of which were not covered completely by material which could not be seen through by the nearest spectator. Violated subparagraph 2 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of sexual intercourse by, with and between human beings. Violated subparagraph 4 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of oral-genital copulation. Violated subparagraph 8 of Paragraph 2 of the modified Injunction by permitting, causing, and exhibiting motion pictures exhibiting or simulating sexual activity where the genitals of the performers can then be seen.

(c) *January 23, 1972:* Violated Paragraph 1 of the original Temporary Injunction by permitting, causing and exhibiting cocktail waitresses the genitalia and anuses and pubic hair areas of which were not covered completely by material which could not be seen through by the nearest spectator. Violated subparagraph 2 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of sexual intercourse by, with and between human beings. Violated subparagraph 4 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of

oral-genital copulation. Violated subparagraph 8 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating sexual activity where the genitals of the performers can then be seen.

(d) *January 24, 1972:* Violated Paragraph 1 of the original Temporary Injunction by permitting, causing and exhibiting cocktail waitresses, the genitalia and anuses and pubic hair areas of which were not covered completely by material which could not be seen through by the nearest spectator. Violated subparagraph 4 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of oral-genital copulation. Violated subparagraph 5 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating the exhibition of acts of rectal foreplay, kissing, touching, caressing, fondling or manipulation of male or female genitals. Violated subparagraph 6 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating the exhibition of female masturbation. Violated subparagraph 8 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating sexual activity where the genitals of the performers can then be seen. Violated subparagraph 9 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating the exhibition of male and female humans

engaging in activities prohibited by subparagraphs 2, 4, 5, 6, and 8 of Paragraph 2 of the modified Injunction by the use of drawings or inanimate objects, referring specifically to the motion picture entitled "Snow White and the Seven Dwarfs."

6) In failing to comply with the Injunction and the stipulated modification thereof as aforesaid, defendant Philip Joseph Maita acted deliberately, wilfully and contemptuously and for the purpose of increasing revenue at, in and about his place of business called Easy Street.

It Is Therefore Ordered And Adjudged that defendant Philip Joseph Maita is in contempt of court as aforesaid and that he be punished therefor by fine and imprisonment as follows:

(a) *January 21, 1972:* For deliberate, wilful and contemptuous disobedience, violations and failure to comply with the Injunction and stipulated modification thereof hereinbefore found to have occurred on January 21, 1972, defendant Philip Joseph Maita is sentenced to pay a fine in the sum of One Thousand Dollars ($1,000.00) without penalty assessment within ten (10) days, viz., no later than 5 o'clock p.m., March 13, 1972, and if the fine is not paid in full within that time defendant be incarcerated in the County Jail for One (1) Day for each Ten Dollars ($10.00) of the fine not paid and, further, that defendant Philip Joseph Maita be confined in the County Jail for the period of Six (6) Months except, however, four (4) months of that time or one hundred twenty (120) days is suspended upon condition that there be no further

violations by defendant Philip Joseph Maita of the Injunction herein.

(b) *January 22, 1972:* For deliberate, wilful and contemptuous disobedience, violations and failure to comply with the Injunction and stipulated modification thereof hereinbefore found to have occurred on January 22, 1972, defendant Philip Joseph Maita is sentenced to pay a fine in the sum of Five Hundred Dollars ($500.00) without penalty assessment within Ten (10) Days, viz., no later than 5 o'clock p.m., Monday, March 13, 1972, and if the fine is not paid in full within that time, defendant be incarcerated in the County Jail for One (1) Day for each Ten Dollars ($10.00) of the fine not paid and, further, that defendant Philip Joseph Maita be confined in the County Jail for the period of Sixty (60) Days, said confinement to run concurrently with the confinement imposed upon defendant for contempt occurring January 21, 1972.

(c) *January 23, 1972:* For deliberate, wilful and contemptuous disobedience, violations and failure to comply with the Injunction and stipulated modification thereof hereinbefore found to have occurred on January 23, 1972, defendant Philip Joseph Maita is sentenced to pay a fine in the sum of Five Hundred Dollars ($500.00) without penalty assessment within Ten (10) Days, viz., no later than 5 o'clock p.m. Monday, March 13, 1972, and if the fine is not paid in full within that time, defendant be incarcerated in the County Jail for One (1) Day for each Ten Dollars ($10.00) of the fine not paid and, further,

that defendant Philip Joseph Maita be confined in the County Jail for the period of Sixty (60) Days, said confinement to run concurrently with the confinement imposed upon defendant for contempts occurring January 21, 1972.

(d) *January 24, 1972:* For deliberate, wilful and contemptuous disobedience, violations and failure to comply with the Injunction and stipulated modification thereof hereinbefore found to have occurred on January 24, 1972, defendant Philip Joseph Maita is sentenced to pay a fine in the sum of Five Hundred Dollars ($500.00) without penalty assessment within Ten (10) Days, viz., no later than 5 o'clock p.m. Monday, March 13, 1972, and if the fine is not paid in full within Ten (10) Days, defendant be incarcerated in the County Jail for One (1) Day for each Ten Dollars ($10.00) of the fine not paid and, further, that defendant Philip Joseph Maita be confined in the County Jail for the period of Sixty (60) Days, said confinement to run concurrently with the confinement imposed upon defendant for contempts occurring January 21, 1972.

It Is Further Ordered that execution of the confinement imposed upon defendant Philip Joseph Maita hereinbefore provided be stayed until 5 o'clock p.m., Friday, March 10, 1972, solely to allow defendant Philip Joseph Maita time to file his proposed Petition for Writ of Certiorari before the Court of Appeal, First Appellate District, State of California. In the event defendant's Petition for Writ of Certiorari is not filed as aforesaid by that time, this stay shall

terminate and defendant shall be incarcerated in the County Jail as hereinbefore provided.

In the event defendant's Petition for Writ of Certiorari is filed as aforesaid within that time, this stay shall continue so long as proceedings continue in the Court of Appeal or until further order of this Court or the Court of Appeal, whichever order shall first occur.

It Is Further Ordered that defendant be admitted to bail in the sum of Five Thousand Dollars ($5,000) cash or surety upon the express conditions of the stay of his confinement to the County Jail hereinabove provided. This Stay Order shall not apply to defendant's payment of the Two Thousand Five Hundred Dollars ($2,500.00) fine ordered herein which shall be paid, in full, on or before 5 o'clock p.m. Monday, March 13, 1972. This Stay Order shall not be construed as affecting in any way the existing Injunction and the stipulated modification thereof.

Dated: This 16th day of March, 1972

Louis B. Dematteis

Judge of The Superior Court

Appendix B

In The Court of Appeal
State of California
First Appellate District

DIVISION TWO

No. 31155

Philip Joseph Maita,
Petitioner,

vs.

Superior Court, County of San Mateo,
Respondent.

People of the State of California,
Real Party in Interest.

[May 19, 1972]

BY THE COURT:

The petition for a writ of certiorari is denied.

Filed May 19, 1972,
Clifford Porter, Clerk.

Dated May 19, 1972

Taylor, P.J.

In the Court of Appeal
State of California
First Appellate District

DIVISION TWO

Crim. No. 10552

In re Philip Joseph Maita
on Habeas Corpus,

vs.

[May 19, 1972]

BY THE COURT:

The petition for a writ of habeas corpus is denied.

Filed May 19, 1972,
Clifford C. Porter, Clerk.

Dated: May 19, 1972.

Taylor, P.J.

Appendix C

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

June 15, 1972

DEAR SIR: I have this day filed Order
Hearing Denied

In re: 1 Civ. No. 31155
Maita
On
Superior Court, San Mateo
Respectfully,
G. E. Bishel
Clerk

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

June 15, 1972

DEAR SIR: I have this day filed Order
Hearing Denied

In re: 1 Crim. No. 10552
Maita
On
Habeas Corpus
Respectfully,
G. E. Bishel
Clerk

Appendix D

With respect to petitioner's request for a jury trial, the Superior Court ruled, after argument by counsel, that "it seems to have established quite clearly, referring to the Schnackenberg case, that . . . a six months sentence is short enough to be petty. The entire discussion of the case indicates that a penalty up to six months is considered to be petty and that the defendant is not entitled to a trial on that issue by jury." (Reporter's Transcript, page 27)

When petitioner objected to the showing of the films which form the basis for the contempt adjudication, upon the ground that they were not obscene and hence were protected by the First Amendment (RT 115), the District Attorney replied:

"I think first and foremost the question of obscenity is not before the Court in this proceeding, which obviously is one of contempt for violating an injunction order of the Court. We are not concerned about whether or not the films are obscene or pornographic. The question before the Court is: Do they violate this injunction? . . . I would simply repeat: It is not the obscenity we are concerned with today . . ." (RT 116) Petitioner's motion was thereupon denied (RT 117).

It was never contended by the District Attorney, nor was it in fact the case, that the films in question here had ever been held to be obscene by the San Mateo County Superior Court.

In The Superior Court Of The State Of California,
In And For The County Of San Mateo

No. 149826

The People of the State of California,
Plaintiff,

vs.

Philip Joseph Maita and August Vennemeyer,
Defendants.

[Jan. 27, 1970]

TEMPORARY INJUNCTION PURSUANT TO SECTION 11227 OF THE PENAL CODE OF CALIFORNIA.

Upon the complaint of Keith C. Sorenson, District Attorney of the County of San Mateo, together with the accompanying affidavits and exhibits thereto, and

Having heard and considered the answer of the defendants and all exhibits introduced thereby, and

Having read and considered the brief and memoranda of points and authorities submitted by the parties herein;

IT IS THE JUDGMENT OF THIS COURT that the grounds and premises and the building located

thereon as described in the complaint herein constitute a nuisance as defined in the brief 11225 of the Penal Code of California by virtue of acts of lewdness there held and occurring.

IT IS ORDERED AND ADJUDGED that the grounds and premises and the building located thereon as described in the court case herein be and the same hereby are, until further order of Court and during the pendency of this action, enjoined as a place to conduct, maintain or continue the acts of lewdness constituting a nuisance complained of in this action by the defendants, or any one of them, or by any other person or persons.

IT IS FURTHER ORDERED AND ADJUDGED that the defendants, Philip Joseph Maita and August Vennemeyer, and their agents and assignees, be and each of them hereby is, until further order of this Court and during the pendency of this action, enjoined and restrained from conducting, maintaining, using, occupying or in any way permitting the use or occupancy of said premises and the buildings located thereon, to-wit: Easy Street Bar, 2322 South El Camino Real, San Mateo, California, for the purpose of lewdness or as a disorderly house as defined in Section 11225 of the Penal Code of California, and more particularly the defendants, Philip Joseph Maita and August Vennemeyer, and their agents and assignees, and each of them, are enjoined and restrained from conducting, maintaining, using, occupying, permitting, causing or exhibiting:

1] Cocktail waitresses the genitalia and anuses of which and the pubic hair areas of which are not covered completely by material which cannot be seen through by the nearest spectator;

2] Dancers and live performers exhibiting genitalia and anuses and pubic hair areas which are not completely covered by material which cannot be seen through by the nearest spectator;

3] Motion pictures or live performances exhibiting or simulating the exhibition of human genitalia and anuses and pubic hair areas which are not completely covered by material which cannot be seen through by the nearest spectator;

4] Motion pictures or live performances exhibiting or simulating the exhibition of acts of sexual intercourse by, with or between human beings;

5] Motion pictures or live performances exhibiting or simulating the exhibition of acts of oral genital copulation;

6] Motion pictures or live performances exhibiting or simulating the exhibition of acts of oral-breast copulation;

7] Motion pictures or live performances exhibiting or simulating the exhibition of male or female masturbation;

8] Motion pictures or live performances exhibiting or simulating the exhibition of female humans engaging in auto eroticisms by the use of any inanimate object.

IT IS FURTHER ORDERED that the defendants herein are given seven (7) days following service of this injunction to answer the complaint for abatement.

Dated: January 27, 1970.

/s/ James T. O'Keefe,
James T. O'Keefe,
Judge of the Court.

Keith C. Sorenson,
District Attorney
By: Kelly Ogle, Deputy,
Hall of Justice and Records,
Redwood City, Ca. 94063.
369-1441; Ext. 2783.
Attorneys for County of San Mateo.

In The Superior Court Of The State Of California,
In And For The County Of San Mateo

No. 149826

The People of the State of California,
Plaintiff,

vs.

Philip Joseph Maita and August Vennemeyer,
Defendants.

[Jan. 27, 1970]

ORDER MODIFYING PRELIMINARY INJUNCTION

Whereas, defendant Philip Joseph Maita by and through his counsel, Donald A. Tenenbaum, Esq., has heretofore filed his Notice of Motion for Modification of Preliminary Injunction, said Notice being dated July 21, 1971; and

Whereas, there is presently in effect in the above-captioned matter a Preliminary Injunction made and ordered by the Honorable James T. O'Keefe, dated and filed January 27, 1970; and

Whereas, pursuant to stipulation of counsel for both parties and order of this Court, the matter of defendant's motion has come on regularly to be heard this 14th day of September, 1971, counsel appearing for both parties; and

Whereas, pursuant to stipulation of counsel for both parties, the within form of Order Modifying Preliminary Injunction is presented to the Court for hearing and consideration; and

The Court having heard and considered arguments of counsel for both parties; the stipulation of counsel for both parties, and the pleadings and records of these proceedings, IT IS ORDERED that pursuant to stipulation of counsel for both parties and good cause appearing therefor, the Preliminary Injunction dated January 27, 1970, presently in effect in these proceedings be, and hereby is, modified as follows:

1. Paragraphs numbered 2] and 3] thereof, page 2, lines 23 through 29, inclusive, are deleted in their entirety;

2. Paragraphs numbered 4] through 8], pages 2 and 3, are amended, modified, renumbered, and supplemented as follows:

2] Motion pictures or live performances exhibiting or simulating the exhibition of acts of

sexual intercourse by, with or between human beings;

3] Motion pictures or live performances exhibiting or simulating the exhibition of acts of sexual intercourse by, with or between human beings and animals (beastiality);

4] Motion pictures or live performances exhibiting or simulating the exhibition of acts of oral-genital copulation;

5] Motion pictures or live performances exhibiting or simulating the exhibition of acts of rectal foreplay, kissing, touching, caressing, fondling or manipulation of male or female genitalia.

6] Motion pictures or live performances exhibiting or simulating the exhibition of male or female masturbation;

7] Motion pictures or live performances exhibiting or simulating the exhibition of sodomy or flagellation;

8] Motion pictures or life performances exhibiting or simulating sexual activity where the genitals of the performers can then be seen;

8] Motion pictures or live performances exhibiting or simulating the exhibition of male or female *humans* engaging in auto-eroticisms or any of the prohibited activities hereinabove described by the use of any drawing, artificial device or inanimate object.

3. Except as hereinabove specifically provided, the Preliminary Injunction presently in effect in these proceedings dated January 27, 1970, is and shall continue to be in full force and effect and shall here-

after be considered and construed with this Order Modifying Preliminary Injunction as one instrument enjoining and constraining defendants as provided herein.

Dated: September 14, 1971.

/s/ J. A. Branson,
Judge of the Superior Court.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No.

PHILIP JOSEPH MAITA, *Petitioner*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
Respondent

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The judgment and order of the Superior Court (*People v. Maita and Vennemeyer*, No. 149826) is set forth in Appendix A. The order of the California Court of Appeal denying the petition for writ of habeas corpus or certiorari is set forth in Appendix B. The order of the California Supreme Court denying petition for hearing of habeas corpus or certiorari is set forth in Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Does the Sixth Amendment require the states to grant jury trials to a defendant charged with several criminal contempts in a single action where the maximum possible imprisonment for a single contempt is six months and where the total imprisonment actually imposed is less than six months?

2. Does petitioner's failure to raise the issue of whether he was entitled to a jury trial because of the fine imposed preclude consideration of the issue?

3. Does the Sixth Amendment require the states to afford a jury trial in a case where a $2500 fine is imposed?

4. May petitioner raise the issue of whether his activities were subjected to a prior restraint violative of the First Amendment despite the fact that that issue was not necessary to the state court's determination of this case?

5. Is the conduct that is the target of the modified injunction in the instant case protected by the First Amendment?

6. Assuming, *arguendo*, that the conduct proscribed by the injunction is conduct protected by the First Amendment, is the injunction nevertheless a valid restraint?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First, Sixth and Fourteenth Amendments to the Constitution of the United States, as follows:

> First Amendment: "Congress shall make no law . . . abridging the freedom of speech. . . ."
>
> Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."
>
> Fourteenth Amendment: "Nor shall any state deprive any person of life, liberty and property without due process of law. . . ."

California Penal Code sections 11225 *et seq.*, as follows:

> §11225. Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation or prostitution, are held or occur, is a nuisance which shall be enjoined, abated and prevented, whether it is a public or private nuisance.
>
> Nothing in this section shall be construed to apply the definition of a nuisance to a private residence where illegal gambling is conducted on an intermittent basis and without the purpose of producing profit for the owner or occupier of the premises.
>
> §11226. Whenever there is reason to believe that a nuisance as defined in this article is kept, maintained or is in existence in any county, the

district attorney, in the name of the people of the State of California, must, or any citizen of the State resident within said county, in his own name may, maintain an action in equity to abate and prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee or agent of the building, or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting it.

§11227. Whenever the existence of a nuisance is shown in an action brought under this article to the satisfaction of the court or judge thereof, either by verified complaint or affidavit, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance.

§11228. Actions brought under this article have precedence over all actions, excepting criminal proceedings, election contests and hearings on injunctions, and in such actions evidence of the general reputation of a place is admissible for the purpose of proving the existence of a nuisance. If the complaint is filed by a citizen, it shall not be dismissed by the plaintiff or for want of prosecution except upon a sworn statement made by the complainant and his attorney, setting forth the reasons why the action should be dismissed, and the dismissal ordered by the court. In case of failure to prosecute any such action with reasonable diligence, may substitute any other citizen consenting thereto for the plaintiff. If the action is brought by a citizen and the court finds there was no reasonable ground or cause therefor, the costs shall be taxed against such citizen.

§11229. Any violation or disobedience of an injunction or order expressly provided for by this article is punishable as a contempt of court by a fine of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000), by imprisonment in the county jail for not less than one nor more than six months, or by both.

STATEMENT OF CASE AND FACTS

On December 11, 1969, the San Mateo District Attorney filed in Superior Court a "Complaint for Equitable Relief from Nuisance," pursuant to the California Red Light Abatement Law, which named as defendants petitioner and one August Vennemeyer, together with property known as the Easy Street Bar. The complaint alleged that acts of "lewdness"—as that term is used in California Penal Code section 11225—were being permitted in the Easy Street Bar.

Hearing on the complaint was held December 17, 18, 22, 23, 29, 30, 31, 1969, and January 6, 7, and 8, 1970. Subsequently, the Superior Court issued a Memorandum Decision which ruled, *inter alia,* that the conduct at Easy Street was lewd within the meaning of the statute. Evidence adduced at the hearing which the Superior Court reviewed in making its finding of lewdness included evidence of nude cocktail waitresses, nude dance performances and the exhibition of color motion pictures of nude males and females engaging in sexual activities "including graphic and explicit view of sexual intercourse and oral genital copulation." In making the finding of lewdness, the

Superior Court specifically equated the definition of lewdness with the definition of obscenity, *i.e.*, the terms "lewd matter" and "obscene matter" were both defined as matter "which taken as a whole, the predominant appeal of which to the average person applying contemporary standards is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance or value."

The Superior Court issued a temporary injunction, pursuant to California Penal Code section 11227, which enjoined petitioner and codefendant Vennemeyer from "conducting, maintaining, using, occupying, permitting, causing or exhibiting:

> "1) Cocktail waitresses the genitalia and anuses of which and the pubic hair areas of which are not covered completely by material which cannot be seen through by the nearest spectator;
>
> "2) Dancers and live performers exhibiting genitalia and anuses and pubic hair areas which are not completely covered by material which cannot be seen through by the nearest spectator;
>
> "3) Motion pictures or live performances exhibiting or simulating the exhibition of human genitalia and anuses and pubic hair areas which are not completely covered by material which cannot be seen through by the nearest spectator;
>
> "4) Motion pictures or live performances exhibiting or simulating the exhibition of acts of

sexual intercourse by, with or between human beings.

"5) Motion pictures or live performances exhibiting or simulating the exhibition of acts of oral genital copulation;

"6) Motion pictures or live performances exhibiting or simulating the exhibition of acts of oral-breast copulation;

"7) Motion pictures or live performances exhibiting or simulating the exhibition of male or female masturbation.

"8) Motion pictures or live performances exhibiting or simulating the exhibition of female humans engaging in auto-eroticisms by the use of any inanimate object."

Petitioner challenged this injunction with a petition for writ of prohibition in the California Court of Appeal. The petition for writ of prohibition was denied February 18, 1970; and a petition for hearing in the California Supreme Court (1/Civil 27808) was denied March 19, 1970.

On September 14, 1971, pursuant to a stipulation, an order was filed, which read in part as follows:

"The preliminary injunction dated January 27, 1970, presently in effect in these proceedings . . . is modified as follows:

"1. Paragraphs numbered 2] and 3] thereof, page 2, lines 23 through 29, inclusive, are deleted in their entirety;

"2. Paragraphs numbered 4] through 8], pages 2 and 3, are amended, modified, renumbered, and supplemented as follows:

2] Motion pictures or live performances exhibiting or simulating the exhibition of acts of sexual intercourse by, with or between human beings;

3] Motion pictures or live performances exhibiting or simulating the exhibition of acts of sexual intercourse by, with or between human beings and animals (beastiality);

4] Motion pictures or live performances exhibiting or simulating the exhibition of acts of oral-genital copulation;

5] Motion pictures or live performances exhibiting or simulating the exhibition of acts of rectal foreplay, kissing, touching, caressing, fondling or manipulating of male or female genitalia.

6] Motion pictures or live performances exhibiting or simulating the exhibition of male or female masturbation;

7] Motion pictures or live performances exhibiting or simulating the exhibition of sodomy or flagellation;

8] Motion pictures or live performances exhibiting or simulating sexual activity where the genitals of the performers can then be seen;

9] Motion pictures or live performances exhibiting or simulating the exhibition of male or female humans engaging in auto-eroticisms or any of the prohibited activities hereinabove described by the use of any drawing, artificial device or inanimate object.

"3. Except as hereinabove specifically provided, the Preliminary Injunction presently in effect in these proceedings dated January 27,

1970, is and shall continue to be in full force and effect and shall hereafter be considered and construed with this Order Modifying Preliminary Injunction as one instrument enjoining and constraining defendant as provided herein."

On February 2, 1972, the Superior Court ordered petitioner and codefendant Vennemeyer to show cause why they should not be held in contempt for willful violation of the temporary injunction as modified by the stipulated order of September 14, 1971. Hearing on the order to show cause was held February 18 and March 2 and 3, 1972.

At the conclusion of the hearing, the court found that petitioner's conduct in exhibiting certain films and in permitting his waitresses to work while nude violated the injunctions.[1] Petitioner was found guilty of four counts of contempt — one count for each date on which he had permitted the proscribed conduct. On Count One, petitioner was fined $1000 and sentenced to 6 months in the county jail, with 4 months of the sentence suspended. On each of the other 3 counts, petitioner was fined $500 and sentenced to 60 days in the county jail. Jail sentences for all counts were made concurrent. All portions of the sentence are presently stayed.

The Superior Court dismissed the charges of contempt against codefendant Vennemeyer without objection from the district attorney.

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[1]The specific provisions of the injunctions which the court found had been violated are paragraph 1 of the original temporary injunction and subparagraphs 2, 4, 5, 6, 8 and 9 of paragraph 2 of the modified injunction. See pp. 6-8, *supra*.

ARGUMENT

I

THE SIXTH AMENDMENT DOES NOT REQUIRE THE STATES TO GRANT JURY TRIALS TO A DEFENDANT CHARGED WITH SEVERAL COUNTS OF CRIMINAL CONTEMPT WHERE THE MAXIMUM POSSIBLE IMPRISONMENT ON CONVICTION FOR A SINGLE COUNT IS SIX MONTHS AND WHERE THE TOTAL IMPRISONMENT ACTUALLY IMPOSED FOR CONVICTIONS ON ALL COUNTS IS LESS THAN SIX MONTHS.[2]

The Sixth Amendment does not require that states grant jury trials to persons charged with petty offenses. *Baldwin v. New York,* 399 U.S. 66 (1970); *Duncan v. Louisiana,* 391 U.S. 145 (1968); *Bloom v. Illinois,* 391 U.S. 194 (1968); *Cheff v. Schnackenberg,* 384 U.S. 373 (1966); *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury,* 39 Harv. L.Rev. 917, Frankfurter and Corcoran (1926). Criteria that are relevant to a classification of an offense as petty or serious for purposes of the Sixth Amendment's jury trial provision include the severity of the penalty, the moral quality of the act and the act's relation to common law crimes. *District of Columbia v. Clawans,* 300 U.S. 617, 625 (1937). The history and the nature of criminal contempt do not—without reference to penalty—warant classification of this offense as serious. *Bloom v. Illinois, supra,* 391 U.S. at 198; *Cheff v. Schnackenberg, supra,* 384 U.S. at 380. For crimes generally and for criminal contempts in par-

---

[2]We recognize that a consideration of the fines discussed in Argument III, *infra,* may be required for a proper consideration of the instant issue. We have separated the two issues because we are contending that the jury trial issue raised by the imposition of the fines is not properly before this Court. Arguments II and III, *infra.*

ticular, the penalty is the most important consideration in classifying the crime as serious or petty. *Baldwin v. New York, supra,* 399 U.S. at 68; *Bloom v. Illinois, supra,* 391 U.S. at 211.

It has already been decided that where the Legislature has prescribed a penalty exceeding 6 months for an offense, that offense is classified as serious. *Baldwin v. New York, supra.* It has also been decided that where the Legislature has not fixed a maximum possible penalty, one must look to the penalty actually imposed to determine the seriousness of the offense. *Bloom v. Illinois, supra,* 391 U.S. at 211. For a single conviction of the offense here before us, California law provides a maximum possible penalty of 6 months. The total sentence petitioner is actually likely to serve should his conviction stand, is 60 days.[8] Petitioner contends that for purposes of interpreting the Sixth Amendment jury trial provision, the 6-month maximum possible penalty should be multiplied by 4—*i.e.*, the number of counts with which petitioner was charged—thereby giving a total of 24 months maximum possible penalty and, according to petitioner, giving him the right to a jury trial under the rule of *Baldwin v. New York, supra.* For this contention, petitioner relies heavily on the statement in *Baldwin* that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than 6 months is authorized." *Id.* at 69. We

[8]On one count, petitioner did receive a 6-month sentence but 4 of those 6 months are suspended. See Statement of Case and Facts, *supra,* p. 9.

believe that petitioner misconstrues the meaning of the quoted statement.

The maximum penalty that the Legislature authorizes is important as a criterion in the determination of the seriousness of the offense because that maximum penalty reflects the Legislature's and presumably society's judgment of the seriousness of the offense.[4] *Duncan v Louisiana, supra,* 391 U.S. at 160, 162; *District of Columbia v. Clawans, supra,* 300 U.S. at 625-627. Because the legislative maximum penalty reflects society's judgment of the gravity of the crime, a person cannot be constitutionally convicted of a single offense carrying a maximum possible penalty that exceeds 6 months even though he is actually sentenced to less than 6 months. *Baldwin v. New York, supra,* 399 U.S. at 69. When a person is charged in a single action with several counts of an offense which the Legislature has, by its assignment of the maximum penalty, designated as petty[5] the joining of the counts does not change the legislative judgment of the nature of the offense. The moral quality of the act involved and the act's relation to common law crimes remain the same. See *District of Columbia v. Clawans, supra,* 300 U.S. at 625.

We do not contend that this Court's previously announced limitations on actual penalty (*Bloom v.*

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[4]In this respect, it is relevant to note that in California there is a presumption favoring concurrent sentences which operates to make all sentences which are simultaneously imposed concurrent unless otherwise specified. Cal. Pen. Code § 669.

[5]We assume here an offense like criminal contempt, which is not —without consideration of the penalty—a serious offense.

Illinois, supra, 391 U.S. at 211) for persons not afforded the right to jury trial, could be escaped by joining several counts of a petty offense. *Compare United States v. Seale,* 461 F.2d 345 (7th Cir. 1972). Assignment of importance to the actual penalty when interpreting the Sixth Amendment jury trial provision reflects a concern in addition to the concern of what judgment the Legislature has made of the crime's onerousness. That is, the actual penalty is important because no matter what the moral quality of the act and no matter what the act's relation to common law crimes (see *District of Columbia v. Clawans, supra*), the Sixth Amendment will not permit severe imprisonment where a person has not been afforded the right to a trial by jury. *Bloom v. Illinois, supra,* 391 U.S. at 211. See also *Argersinger v. Hamlin,* 407 U.S. 25 (1972).

In the instant case then, the Legislature having adjudged the offense as petty by its prescription of a 6-month maximum penalty and criminal contempt being otherwise considered a petty offense, it is the actual penalty that should be looked to. *State v. Owens,* 254 A.2d 97 (N.J. Sup.Ct. 1969); *State v. Koscot,* 330 N.Y.S. 492 (1972). See also *United States v. Seale, supra,* at 356.[6] Here the actual penalty is

[6]Where the maximum authorized penalty for a petty offense is 6 months, joinder of several counts of the offense in a single action serves a useful purpose even though the actual penalty limit (*e.g.,* 6 months) could be theoretically reached with a conviction for a single count. The trial may produce a guilty verdict on only one count and even if guilty verdicts are returned on several counts, those verdicts will be important to determine the actual penalty within the 0 to 6 month range.

60 days, which leaves the case in a category where a state may proceed without offering the right to a jury trial.

II

PETITIONER'S FAILURE TO PRESENT THE STATE COURTS WITH THE ISSUE OF WHETHER HE WAS ENTITLED TO A JURY TRIAL BECAUSE OF THE FINE IMPOSED PRECLUDES CONSIDERATION OF THE ISSUE AT THIS JUNCTURE.

This Court has repeatedly held that it will only review those federal questions which were properly presented in the state proceedings. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Ferguson v. Georgia*, 365 U.S. 570, 572 (1961); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). See also *Street v. New York*, 394 U.S. 576, 583 (1969). The federal issue must have been raised with specificity and state courts need not search through the brief to properly formulate the issue for the petitioner. *Street v. New York, supra*, at 583; *Beck v. Washington, supra*, at 553; *Stembridge v. Georgia, supra*, at 547. Where the highest court of the state does not deliver an opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. *Stembridge v. Georgia, supra*, at 547.

In the petition for writ of habeas corpus or certiorari which the petitioner filed in the California Court of Appeal, he used this heading for his argument on the Sixth Amendment jury trial issue: "As

a matter of federal constitutional law, petitioner was entitled to trial by jury." Under this heading petitioner discussed only the issue of whether the maximum possible *imprisonment* gave him the right to a jury trial. (The complete argument presented to the California Court of Appeal by petitioner on the Sixth Amendment jury trial issue is attached hereto as Appendix D.) The same is true of the petition for hearing filed with the California Supreme Court. (The complete argument which petitioner filed with the California Supreme Court on the Sixth Amendment jury trial issue is attached hereto as Appendix E.) Nowhere in either petition was it argued that the fines imposed entitled petitioner to a jury trial under the Sixth Amendment. The theory that fines may render the right to a jury trial applicable is clearly distinct from the theory behind the rule that imprisonment of a certain length will render the right to jury trial applicable. See Argument I, *supra*, and Argument III, *infra*. The theory concerning fines is not treated in this Court's recent decisions of *Baldwin v. New York*, *Duncan v. Louisiana*, *Bloom v. Illinois*, and *Cheff v. Schnackenberg*, and the paucity of appellate cases generally that deal directly with this issue further demonstrates the comparative novelty of the fines theory. See Argument III, *infra*, and Petitioner's Petition, pp. 9-11. Under these circumstances, it cannot fairly be said that the California Supreme Court passed upon the fines theory, and petitioner should be barred from having this theory considered at the present time.

III

ASSUMING ARGUENDO THAT THE ISSUE IS PROPERLY BEFORE THIS COURT, THE SIXTH AMENDMENT DOES NOT REQUIRE THE STATES TO AFFORD A JURY TRIAL IN A CASE WHERE A $500 FINE IS IMPOSED.

In *United States v. Mine Workers*, 330 U.S. 258, 269 (1947), an individual defendant was fined $10,000 and a labor union defendant $3,500,000. This Court held that the trial that led to these fines was properly conducted by a judge without a jury. *Id.* at 298.[7]

Petitioner correctly cites *United States v. R. L. Polk and Co.*, 438 F.2d 377 (6th Cir. 1971), as a case which holds that a fine exceeding $500 may not be imposed without affording the defendant the right to a trial by jury.[8] *Polk* is *contra* to *United States v. Mine Workers, supra*, and, we contend, constitutes an incorrect application of this Court's recent interpretations of the jury trial provision. The decision in *Polk* relies completely upon one criterion for its determination of whether a defendant has a right to jury trial. That criterion is section 1 of Title 18 of the United States Code which defines a petty offense as:

> "Any misdemeanor the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both is a petty offense."

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[7]The contempt judgment against the union was held excessive and was modified so as to require the union to pay a fine of $700,000 and to pay the additional $2,800,000 unless the union complied with the lower court's order within a specified time period. *Id.* at 305.

[8]In *Polk*, the Circuit Court of Appeals did not reverse the conviction but remanded the case to the district court with instructions to reduce the fine to $500.

This statute was only one of several criteria relied upon in the cases of *Baldwin v. New York, supra,* 399 U.S. at 70-71; *Duncan v. Louisiana, supra,* 391 U.S. at 160-162; *Bloom v. Illinois, supra,* 391 U.S. at 204-210; *Cheff v. Schnackenberg, supra,* 384 U.S. at 379-380; and nowhere in these four opinions does this Court refer to the statute as the controlling test for purposes of the jury trial provision. Furthermore, none of these four opinions dealt with the fines proviso of section 1 of Title 18. We think that the recent case of *Argersinger v. Hamlin, supra,* makes it clear that the fine proviso of that statute is not to be inserted into the right to jury trial test.

The Sixth Amendment right at issue in *Argersinger* was the right to counsel. The petitioner in *Argersinger* was tried for an offense punishable by imprisonment up to 6 months, a $1000 fine or both, and was given a 90-day jail sentence. This Court reversed the conviction holding that no person may be imprisoned for any offense unless afforded the right to counsel. The decisions of *Baldwin, Duncan, Bloom* and *Cheff* which hold that a person may be imprisoned for as much as 6 months without being afforded the right to jury trial are not disturbed by *Argersinger.* The *Argersinger* opinion explains that the category of cases in which the right to counsel applies is broader than the category of cases in which the right to jury trial applies and, further, that the latter category encompasses the former. *Argersinger v. Hamlin, supra,* at 27-31, 45-46.

Important to the instant discussion is the fact that in *Argersinger* the offense carried the possibility of a $1000 fine.[9] Under the reasoning of *United States v. R. L. Polk, supra,* this fact by itself would have required that Argersinger be afforded the right to jury trial and—because the right to counsel exists in all cases in which the right to jury trial exists—the right to counsel. Yet the possibility of a $1000 fine is nowhere cited as a basis for the *Argersinger* holding.

The the reasoning of *Polk* is unsound is also supported by this statement of Justice Powell concurring in *Argersinger:*

> "As used herein, the term 'petty offense' means any offense where the authorized imprisonment does not exceed 6 months, *Baldwin v. New York,* 399 U.S. 66, 69 (1970). *It also includes all offenses not punishable by imprisonment regardless of the amount of any fine that might be authorized. To this extent, the definition used herein differs from the Federal statutory definition of 'petty offense' which includes offenses punishable by not more than 6 months imprisonment or by a fine not exceeding $500.* 18 U.S.C. §1." 407 U.S. at 45 n. 2, (emphasis added).

We would submit that the reasoning of *United States v. R. L. Polk, supra,* is incorrect and that the holding of *United States v. Mine Workers, supra,* is still valid.

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[9]In *Argersinger* no fine was actually imposed.

IV

PETITIONER MAY NOT RAISE THE ISSUE OF WHETHER HIS ACTIVITIES WERE SUBJECTED TO A PRIOR RESTRAINT VIOLATIVE OF THE FIRST AMENDMENT BECAUSE THAT ISSUE WAS NOT NECESSARY TO THE STATE COURT'S DETERMINATION OF THIS CASE.

This Court will not take jurisdiction to review a judgment where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground. *Stembridge v. Georgia, supra,* 343 U.S. at 547; *Hedgebeth v. North Carolina,* 334 U.S. 806 (1948); *Woods v. Nierstheimer,* 328 U.S. 211 (1946); *White v. Ragen,* 324 U.S. 760 (1945); *McGoldrick v. Gulf Oil Corp.,* 309 U.S. 2 (1940). See Argument II, *supra.* The nonfederal ground upon which the California courts' rejection of petitioner's First Amendment contention might have rested in the instant case is estoppel.

Petitioner's first petition for hearing in the California Supreme Court—which challenged the original temporary injunction—was denied on March 19, 1970. After the denial of this petition for hearing, petitioner agreed to abide by the terms of the temporary injunction. The district attorney thereupon agreed to take off calendar the hearing on the plea for abatement.[10] Nothing further occurred in the proceedings until September 1971 when the injunction was modified by stipulation. Some of the language of the modification was suggested by petitioner's attorney.

[10]These facts are detailed in an affidavit prepared by the deputy district attorney who was then handling this case. The affidavit was presented to the California Court of Appeal and the California Supreme Court and is attached hereto as APPENDIX F.

The district attorney never attempted to recalendar the hearing on the plea for abatement. Thus, by agreeing to abide by the injunction, petitioner kept the injunction in effect and secured the advantage of preventing any attempt to bring the matter to the final abatement judgment which the California Red Light Abatement Law contemplates.[11]

California has long recognized the doctrine of estoppel. See, *e.g.*, *Lerner v. Los Angeles City Board*, 59 Cal.2d 382, 396 (1963); *Carruth v. Fitch*, 36 Cal. 2d 426, 433 (1950). Under the circumstances presented by this case, the doctrine constituted an adequate state ground for the rejection of petitioner's First Amendment contention.

V

THE CONDUCT THAT IS THE TARGET OF THE MODIFIED INJUNCTION IS NOT PROTECTED BY THE FIRST AMENDMENT.

Petitioner argues that the injunction as modified violates his First Amendment right by prohibiting the showing of motion pictures which have not been adjudged obscene. Petitioner correctly cites *Burstyn v. Wilson*, 343 U.S. 495, 502-503 (1952), for the holding that motion pictures are "included within the free

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[11]Penal Code section 11230 directs in part that "if the existence of a nuisance is established in an action as provided in this article, an order of abatement shall be entered as a part of the judgment in the case directing the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding or abetting the nuisance and directing the sale thereof in the manner provided for the sale of chattels under execution and the effectual closing of the building or place against its use for any purpose and that it be kept closed for a period of one year unless sooner released."

speech and free press guarantees of the First and Fourteenth Amendments." Motion pictures, though, are not "necessarily subject to the precise rules governing any other particular method of expression" (*Burstyn v. Wilson, supra,* at 502-503) and as "the mode of expression moves from the printed page to the commission of public acts which may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." *California v. LaRue,* U.S. Sup. Ct., Dec. 5, 1972, 41 U.S.L.W. at pp. 4039, 4042. This Court has rejected the proposition that a "limitless variety of conduct may be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *California v. LaRue, supra,* 41 U.S.L.W. at 4042; *United States v. O'Brien,* 391 U.S. 367, 376 (1968).

In the instant case, the injunction prohibits films that depict masturbation, sodomy, flagellation, graphic sexual activity, and the fondling of genitalia—all activities, the depiction of which has previously been labeled obscene by this Court. *Mishkin v. New York,* 383 U.S. 502, 505 (1966); *Ginzburg v. United States,* 383 U.S. 463, 471 (1966). See *Landau v. Fording,* 245 Cal.App.2d 820, 822, *affirmed per curiam,* 388 U.S. 456. While it is true that the injunction prohibits all films depicting the described activities without regard to the qualities of the films otherwise, the injunction is directed only against the showing of the films in one specific setting, *i.e.,* a liquor bar with patronage composed of the general public. Thus, the prohibited showings are not ones catering to the scientific or literary interests of scholars (*Compare Ginzburg v.*

United States, supra, at 469-474); rather, they are ones designed to appeal to the prurient interests of ordinary persons in a barroom setting.

Under *California v. LaRue,* the conduct here at issue could clearly have been prohibited through California's authority to control the dispensation of liquor.[12] Even though the instant prosecution was not initiated by the State's liquor control authorities, the result sought is the same. That is, the modified injunction seeks to prohibit the above-described activities in a place where liquor is dispensed.

We submit that under these circumstances, the conduct proscribed by the injunction is not conduct that comes within the protection of the First Amendment.

VI

ASSUMING ARGUENDO THAT THE CONDUCT PROSCRIBED BY THE INJUNCTION IS CONDUCT PROTECTED BY THE FIRST AMENDMENT, THE INJUNCTION NEVERTHELESS REMAINS AS A VALID RESTRAINT.

Petitioner alleges that the injunction as modified constitutes an invalid prior restraint on his right of free expression. This assertion ignores the fact that petitioner received due notice of the request for the injunction and an opportunity to controvert the respondent's contentions. In fact, petitioner was al-

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[12]The injunction in the instant case is much narrower than the regulations described in *LaRue.* The *LaRue* regulations prohibit the showings of films which merely display pubic hairs, anuses, vulvas or genitals—without regard to presence or absence of sexual activity. *Compare, California v. LaRue,* 41 U.S.L.W. at 4040 with the modified injunction of the instant case, Statement of Case and Facts, *supra,* at pp. 6-8.

lowed to present the testimony of 21 witnesses to controvert the respondent's allegations and proof. Based on this evidence, the judgment of respondent court was that the described premises constituted a nuisance "by virtue of acts of lewdness." Appendix A. The Court's memorandum decision makes it clear that "lewd" was treated as synonymous with "obscene" and that correct First Amendment principles were applied. Appendix A.

The California Red Light Abatement law under which petitioner was sued actually contemplates the issuance of a temporary injunction upon verified complaint or affidavit with a full adversary hearing to presumably follow soon after the issuance of the injunction. Cal. Pen. Code §§11225, *et seq.* See pages 3-5, *supra. Compare Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 437-445 (1957). In the instant case, the district attorney did not seek the injunction until after the full adversary hearing had been held. After the injunction issued, petitioner, through his attorney, sought to avoid the judgment of abatement by agreeing to comply with the injunction. See Argument IV, *supra.*

In this posture, the injunction against petitioner is not unlike a condition of probation. That is, petitioner was afforded a full hearing on the merits and was found to have allowed obscene conduct. It would appear that petitioner has the option yet of terminating the injunction by moving to proceed to judgment or by otherwise moving to terminate the proceedings in the superior court. *Compare People v. Mason,* 5

Cal.3d 759, 764 (1971). Thus even if the instant injunction is viewed as embracing some conduct that is within the First Amendment's protection, the injunction is nevertheless valid because petitioner has waived those First Amendment benefits to avoid the abatement judgment. *Compare Zap v. United States*, 328 U.S. 624 (1946) [advance waiver of right to privacy given to obtain government business].

We submit that the injunction constitutes a valid restraint.

CONCLUSION

For the stated reasons, the People of the State of California respectfully urge this Court to deny the petition for writ of certiorari.

Dated, January 10, 1973.

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(Appendices Follow)

Appendix A

In the Superior Court of the State of California, in and for the County of San Mateo

No. 149826

The People of the State of California ex rel. Keith Sorenson, District Attorney County of San Mateo,

Plaintiff,

against

Philip Joseph Maita, August Vennemeyer, and a certain portion of land and building thereon known as Easy Street Bar, situated at 2322 South El Camino Real, City of San Mateo, State of California, as Mortgagee and lessee, and all other persons unknown claiming any right, title or interest in the property affected by this action,

Defendants.

[Filed Jan. 27, 1970]

MEMORANDUM DECISION

The hearing of the above entitled matter (temporary/preliminary injunction under Section 11225, and following Sections of the Penal Code of the State of California, "Red Light Abatement Law",) having been heretofore submitted for consideration and decision, now the Court, having considered the same

and being fully advised herein, renders the following decision:

The defendant raises the question of this Court's jurisdiction to act in the matter; so this will be dealt with at the outset.

Jurisdiction

The defendant argues that Penal Code Section 11225 does not apply to the instant case and therefore the Court has no jurisdiction to act. In this regard the defendant argues that since the section is entitled "Place of Prostitution, a Nuisance" without mention of lewdness or assignation, the legislature only intended the statute to apply when the element of prostitution was present in conjunction with lewdness or assignation.

Section 11225 states:

> "Every building . . . in which acts of . . . *lewdness, assignation,* or prostitution . . . occur, is a nuisance which shall be enjoined, abated, and prevented, whether it is a public or private nusance." (Emphasis added.)

Thus the *language of the section* clearly indicates that the legislature intended that the elements be applied disjunctively. The title to the section is not controlling.

Furthermore, in *People v. Arcega,* 49 C.A. 239 (1920), the court states:

> ". . . obviously the nuisance upon which the statute places its ban may consist alone of acts of lewdness."

The defendant argues that to allow the District Attorney to use section 11225 is to reduce the burden of proof from beyond a reasonable doubt and to deprive the defendant of a trial by jury.

The answer to this argument, put quite simply, is that this is not a criminal action against the defendant Maita per se, but a civil action to abate a nuisance, i.e. to close a building.

Defendant argues that equitable relief should not be available because there is an adequate remedy at law, i.e. criminal charges against the defendant Maita.

The answer to this argument would appear to be that the legislature has chosen to make the equitable remedy available ("shall be enjoined, abated . . .") and it would appear that the legislature has thus made a binding determination that other and existing remedies are not in fact adequate.

Defendant argues that equitable jurisdiction, if present, should not be exercised to enjoin the commission of a crime.

However, defendant's own citation of *People v. Lim*, 18 C.2d 872 (1941), would appear to dispose of the matter. In *Lim*, the court stated that equity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and *in the absence of a specific legislative declaration to that effect*, the courts should not broaden the field in which injunctions against criminal activity will be granted. The simple answer is that section 11225 is just such a specific legislative declaration. See also

in this regard *Burton v. Superior Court*, 68 C. 2d 684, 693.

Defendant argues that a preliminary injunction would violate the usual purpose of preserving the status quo until trial and judgment.

While defendant is correct in stating that the effect of the preliminary injunction would be to change the status quo, the answer to his argument appears to be that this is exactly the procedure and the effect that the statute contemplates.

The defendant argues that section 11225 is overbroad and excessive in its impact in view of the fact that the alternative means of criminal prosecution is available to enforce the legitimate governmental objective of prohibiting the public display of lewd or obscene conduct.

In explaining this theory, the Supreme Court in *Vogel v. County of Los Angeles*, 68 C. 2d 18 (1967), held:

> "Precision of regulation is required so that the exercise of most precious freedoms will not be unduly curtailed *except to the extent necessitated* by the legitimate governmental objective." (Emphasis added.)

The United States Supreme Court expressed the rule in *Shelton v. Tucker*, 364 U.S. 479 (1960), wherein it stated:

> "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that *broadly stifle fundamental*

personal liberties, when the end can be more narrowly achieved." (Emphasis added.)

Or as counsel for the defendant so quaintly puts it,

"This declaration of constitutional law prohibits the meat cleaver where the scalpel, the more sensitive tool, will do; . . .".

The point is that in the instant case, section 11225 is in fact the more sensitive tool, the scalpel as opposed to the meat cleaver of criminal punishment. Is not imprisonment more prone to stifle fundamental personal liberties than the civil abatement of a nuisance? Is not the legitimate governmental interest in preventing lewd or obscene conduct or displays more narrowly achieved by closing of a building and operation than by imprisonment of the defendant? Thus it would appear that section 11225 is, when compared to the alternative of criminal prosecution, far less subversive of or burdensome on fundamental First Amendment rights.

Defendant argues that this Court should not order a preliminary injunction due to the continual development, interpretation and refinement of the statutes regulating obscene material.

Counsel is certainly correct in his assertion that the law of obscenity has been undergoing almost constant change and reinterpretation by our appellate courts. Indeed where or when the law will finally rest, we do not know. The Court must, however, take the law as it finds it, as it exists today, not as it may or may not exist sometime in the future. Trial Courts

must decide cases when they are submitted to them; Judges are not permitted the luxury of the scholar who can await further development in the law before committing himself. *Courts must not and cannot shrink from their duty to make decisions when they are called upon to do so, by the law as it exists at that point in time.* Thus the Court may not shirk its duty because the law is in a state of flux.

Defendant argues that even assuming the Court finds the conduct upon the premises to be lewd (i.e., obscene *In Re Giannini* 69 C. 2d 563, 1968), the premises still does not necessarily constitute a nuisance and further that the People have failed in any event to prove that Easy Street constitutes a nuisance.

Section 11225 clearly states that every building in which acts of lewdness occur, "*is a nuisance* which shall be enjoined . . ." (Emphasis added.)

Counsel for the defendant cites several cases for the proposition that a house of prostitution is a nuisance per se and argues that since there is no claim of prostitution at Easy Street, the People must prove not only that lewd conduct occurs therein but also that it otherwise constitutes a nuisance. This argument ignores the plain language of the section. Clearly a building in which acts of lewdness occur is a nuisance per se under section 11225. See also in this regard *People v. Arcega.*

For the foregoing reasons the Court *does have the jurisdiction* to make a decision as to the obscenity (and therefore lewdness) of the conduct at Easy Street and, if the Court finds that said conduct is

obscene within the meaning of the law, to abate the operation as a nuisance under section 11225 of the Penal Code.

Easy Street—Lewdness, Obscenity

The Court having decided on its jurisdiction to deal with this matter, the focus of determination is whether the conduct and entertainment carried on and offered at the Easy Street Night Club, 2322 El Camino Real, San Mateo, San Mateo County, California, is lewd or obscene as those terms are defined by California statute and decision law. (Lewdness and obscenity are synonymous under California law and have been so treated by the parties herein.)

If the finding determines that the lewdness/obscenity exists then Section 11225, and following sections of the Penal Code, must be enforced and injunctive and abatement relief ordered as prescribed.

In essence, the entertainment provided at Easy Street for the paying adult public (being served by nude, that is, topless and bottomless waitresses) is (1) nude dances—this is easily understandable to and ap- tion of color motion pictures of nude males and females engaging in numerous types of gyrations and sexual activities, including graphic and explicit views of sexual intercourse and oral genital copulation. The nude dance performances "Cucumber Dance" and "Snake Dance", as described, each appear to be designed to represent sexual activity connotations. Sexual play is designed to be predominant, particularly in the movies, and to an ascertainable extent, in the nude dances—this is easily understandable to and ap-

preciated by the average adult recipient of the viewing. One does not have to be possessed of the capacity to artistically discern the message to the average person (patron) is basically and patently clear. Were it not so, the whole thing would be completely meaningless; and, it does not take a ditry mind to arrive at this conclusion. The old cliché that "it is in the mind of the beholder" that determines what is obscene is really not a truism, under these circumstances. If matters are so graphically and explicitly presented and portrayed that there is no other conclusion to be drawn than that which is intended by the producer then the "beholder" is possessed of a mind which is, in essence, captive; at this point he has no choice except to logically accept the offering in conformity with the design. While the "beholder" proposition might well apply in many instances, and this is granted, it must be analyzed in the light of the circumstances, in all fairness, of the given case. Now, let us consider the particular case of Easy Street.

The three elements of what is obscene (or lewd) are clear; the interpretation, in any given case, is unclear. Our statutory and decision law in California define obscene matter as that which taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e. a shameful or morbid interest in nudity, sex or excretion; and is matter which taken as a whole goes *substantially beyond customary limits of candor* in description or representation of such matters; and is matter which taken as a whole *is utterly without redeeming social importance or value.*

How do the offerings, entertainment and conduct at Easy Street fit into the elements of the definition of obscenity (lewdness) just herein described? *In Re Giannini* 69 C. 2d 563 (1968) supra, establishes the principles that (1) the community standard is the state-wide community, that is, the State of California, and (2) evidence of community standards (expert) must be introduced for the benefit of the court and/or the jury. Giannini, among other matters, quoting from other cases, states: "Community standards . . can . . hardly be established except through experts . . . There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges . . . Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge, not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standard.'" In this day and age where the rights of persons are zealously protected, in all forms of adversary litigation, it is hard to understand why a juror or judge cannot determine "community standards" because his judgment might be tainted by "personal upbringing or restricted reflection (whatever that means) or particular experience of life." At this point I think that jurors and judges should be protected in their respective rights to judge as the law traditionally empowered them so

to do. However, this court is bound by the dictates of the decisions of our Supreme Court and will follow them, as usual, and in this instance.

In the case we have had expert testimony on the subject of "community standards" (in conformity with the requirements set forth in *Giannini,* supra). Among the witnesses was one Donald Shaidell of the Obscenity Unit of the Los Angeles Police Department; his expertise is on a statewide basis.

Mr. Shaidell, along with certain clinical psychologists, psychiatrists, clergy and officers of the Sexual Freedom League presented testimony in the areas involved herein; other than Mr. Shaidell, who confined himself to standards, the other above named witnesses gave testimony on redeeming social importance and value, which related itself to the following effect: the entertainment offered, particularly the movies, had redeeming social importance and value because it relieved or removed sexual hang-ups and was a further therapy in that the viewers were given the opportunity to observe and know other people, as we are not so sure we know ourselves, as to certain portions of our respective bodies. This Court concludes that as far as therapy is concerned the only type involved here is the financial therapy that is enjoyed by the owner-operator of the night club in question, the purveyor of the filth without any saving grace!

Several movies were shown, and other items of paperback books and other material were submitted in evidence as "comparables" to indicate that what was being offered at Easy Street was within what the

"comparables" might indicate to be the community standard. Among the foregoing items was the Berkeley Barb; if this constitutes a fair "comparable", then trash is the keynote of journalism; it is hardly a fair expression of legally sanctified free journalism; may the patron saint of journalists get to work and tend to his chores! The offered "comparables", including the Berkeley Barb, while interesting as to attempted proof of standards, do not establish the community standard, as far as this court is concerned, in the area of obscenity with which we are here concerned.

In *Giannini,* supra, the court states:

> "Dancing consists in the rhythmical movement of any or all parts of the body in accordance with some scheme of individual or concerted action which is expressive of emotions or ideas." (7 Encyclopaedia Britannica (1945) pp. 13-14.) The Century Dictionary and Cyclopedia defines dance as follows: "dance—A succession of more or less regularly ordered steps and movements of the body, commonly guided by rhythmical intervals of a musical accompaniment; any leaping or gliding movement with more or less regular steps and turnings, expressive of or designed to awaken some emotion. The dance is perhaps the earliest and most spontaneous mode of expressing emotion and dramatic feeling; it exists in a great variety of forms and is among some people connected with religious belief and practice, as among the Mohammedans and Hindus." (2 The Century Dictionary and Cyclopedia (1914) p. 1450.)

The Supreme Court has held that analogous media of expression, such as motion pictures,

come "within the ambit of the constitutional guarantees of freedom of speech and of the press. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (96 L.Ed. 1098, 72 S.Ct. 777)." (Jacobellis v. Ohio (1964) 378 U.S. 184, 187 (12 L.Ed.2d 793, 797, 84 S.Ct. 1676) (judgment of the court per Brennan, J.); see also Flack v. Municipal Court (1967) 66 Cal.2d 981 (59 Cal.Rptr. 872, 429 P.2d 192).) "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging . . . to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." (Joseph Burstyn, Inc. v. Wilson (1952) 343 U.S. 495, 501 (96 L.Ed. 1098, 1105, 72 S.Ct. 777).) (Fn. omitted; italics added.)

The use of the language ". . . organ of public opinion . . ." above quoted is either a Freudian slip or a designed apt expression because the dances at Easy Street in the nude and with gimmicks indeed communicate ideas, obscene in nature and designed as such. Cucumber, snake?? Phallic symbolism??

Conclusion

In People v. Noroff 67 C.2d 791 (1967), followed in In Re Panchot 70 A.C. 109 (1968), the Supreme Court of this State, in decision, expressed the following:

"The United States Supreme Court has wisely recognized that ultimately the public taste must

determine that which is offensive to it and that which is not; a public taste that is sophisticated and mature will reject the offensive and the dull; it will in its own good sense discard the tawdry, and once having done so, the tawdry will disappear because its production and distribution will not be profitable. Understandably, such maturity does not come quickly or easily, and, in a time when the strictures of Victorianism have been replaced by wide swings of extremism, it seems hopelessly remote.

"(4) Yet this court is bound, of course, by the decisions of the United States Supreme Court. That court has imposed its prohibitions only at the outer limits of the area of publication, leaving to the public the task of voluntarily casting out the offensive. *That court has held that the representation of the nude human form in a non-sexual context is not obscene.* The Supreme Court has decided that *the judiciary cannot engage in the task of placing legal fig leaves upon variegated presentations of the human figure.* That court has told us that no matter how ugly or repulsive the presentation, we are not to hold nudity, *absent a sexual activity,* to be obscene. In the materials before us we find some of the poses of the subjects to be inexcusably replusive, and we trust that a discerning public will discard and reject them. But the decisions of the United States Supreme Court tell us that the task of rejection lies not with us but with the public." (Emphasis added.)

Easy Street entertainment, as herein indicated, has sexual context and portrays graphic and explicit sexual activity. This complies with the dictates of

the Supreme Court of the United States and of the Supreme Court of this State on what shall be determined as obscene.

If there ever was a time to affix and appropriately put in place the "legal fig leaf" this is it! If this be not the time to institute "operation fig leaf", then we must forget this whole bit about obscenity and go about our way and do our thing as we personally see fit; the word "obscenity", on this basis, can effectively be removed from both our vocabulary and dictionary, and the problem put to rest in an unmarked grave!

The conduct and entertainment at Easy Street, taken as a whole, is such that the predominant appeal is to prurient interest, and is a matter which, taken as a whole, goes substantially beyond customary limits of candor in description or presentation of such matters; and is a matter which, taken as a whole, is utterly without redeeming social value or importance.

The injunction is granted as prayed, and abatement is ordered pursuant to Section 11227 of the Penal Code of the State of California.

Counsel for Plaintiff will prepare the appropriate order.

Dated: January 26, 1970.

/s/ James T. O'Keefe
Judge of the Superior Court

Appendix B

In the Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Civil No. 31,155

Philip Joseph Maita, Petitioner,

vs.

Superior Court, County of San Mateo, Respondent.

People of the State of California, Real Party in Interest.

[Filed May 19, 1972]

By the Court:

The petition for a writ of certiorari is denied.

Dated May 19 1972

Taylor, P.J.

In the Court of Appeal
State of California
First Appellate District

DIVISION TWO

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1 Crim. No. 10552

In re Philip Joseph Maita on Habeas Corpus.

[Filed May 19, 1972]

By the Court:

The petition for a writ of habeas corpus is denied.

Dated May 19 1972

Taylor, P.J.

Appendix C

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Jun 15 1972

Dear Sir: *I have this day filed Order*

Jun 15 1972

Hearing Denied

In re: 1 Civ. No. 31155

Maita

Superior Court, San Mateo

Respectfully,

G. E. Bishel
Clerk

Appendix D

ARGUMENT PRESENTED TO THE CALIFORNIA COURT OF APPEAL ON THE SIXTH AMENDMENT

V.

AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, PETITIONER WAS ENTITLED TO TRIAL BY JURY

The foregoing discussion dealt exclusively with petitioner's right to trial by jury according to California law. That California may confer upon its citizens a more extensive right to trial by jury than is mandated by the United States Constitution is clear. See *Baker v. City of Fairbanks* (Alaska, 1971) 471 P. 2d 386; *New State Ice Co. v. Leibmann* (1924) 285 U.S. 262, 311, dissenting opinion of Brandeis, J.

Nonetheless, petitioner had a separate, independent right to a jury trial under the Sixth Amendment to the United States Constitution. The United States Supreme Court has held that all citizens are entitled to a jury trial where the offenses charged are not "petty." *Duncan v. Louisiana* (1968) 391 U.S. 145; *Baldwin v. New York* (1971) 399 U.S. 66. A petty offense as defined by the Court is one for which the maximum penalty does not exceed six months, imprisonment.

Here petitioner was facing the loss of his liberty for a maximum period of two years, standing accused of four counts of contempt, each of which carried a maximum penalty of six months in jail. Since the maximum penalty to which he could have been subjected far exceeded the "petty" limitation, petitioner's case falls within the rule of *Bloom v. Illinois* (1968) 392 U.S. 194, and he was entitled to a jury trial.

Appendix E

ARGUMENT PRESENTED TO THE CALIFORNIA SUPREME COURT ON THE SIXTH AMENDMENT

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Appendix F

1/Crim. 10552 & 1/Civil 31155

In the Court of Appeal of the State of California
First Appellate District, Division Two

Philip Joseph Maita,
Petitioner,
vs.
The Superior Court of the State of California in and for the County of San Mateo,
Respondent,
The People of the State of California,
Real Party in Interest.

DECLARATION UNDER PENALTY OF PERJURY

I Wilbur Johnson say:

I am presently a Judge of the Municipal Court of the Southern Judicial District of San Mateo County.

From 1958 to December 31, 1971, I was a Deputy District Attorney of San Mateo County, and in that capacity, I represented the People in the case of *People v. Maita,* San Mateo Superior Court No. 149826. This was a proceeding brought under the Red Light Abatement Law which sought to abate the Easy Street Bar in San Mateo. The complaint in Action No. 149826 was filed on Decmeber 11, 1969, and the Superior Court issued an order requiring the defendants to show cause why a preliminary injunction should not issue. Hearing on that order to show

cause was held December 17, 18, 22, 23, 29, 30 and 31, 1969, and January 6, 7, 8, 1970. The Superior Court issued a temporary injunction on January 27, 1970. The defendants challenged the injunction by filing a Petition for Writ of Prohibition in the California Court of Appeal. The Petition for Writ of Prohibition was denied on February 18, 1970, and the defendant's Petition for Hearing in the California Supreme Court was denied March 19, 1970.

Subsequent to the denial of said Petition for Hearing, I had conversations with Attorney Tenenbaum, who represented defendant Maita. Mr. Tenenbaum stated that his client would abide by the provisions of the temporary injunction. It was thereupon agreed that the hearing on the plea for abatement would be taken off calendar until such a hearing was deemed necessary by the parties.

I turned over the file in Action No. 149826 to another deputy in 1970, but in my capacity as Chief Deputy District Attorney, I retained a supervisory control of the case until my departure from the District Attorney's Office on December 31, 1971. The matter was not calendared for hearing on the plea for abatement during the time that I was a Deputy District Attorney.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at 750 Middlefield Road in the City of Redwood City, County of San Mateo on April 20, 1972.

/s/ Wilbur N. Johnson
Wilbur N. Johnson